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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

H. WAYNE MEACHUM,

Petitioner,

v.

WORTHEN BANK & TRUST COMPANY, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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TO: The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

H. Wayne Meachum, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Arkansas Court of Appeals in cause CA 83-468, affirmed by the Supreme Court of Arkansas on March 11, 1985.

QUESTIONS PRESENTED

1. Does the sole act of a Texas resident, in signing as a guarantor of a lease agreement between two Arkansas corporations, where the Texas resident was never in Arkansas in relation to the transaction and the guaranty was mailed to Texas, signed in Texas and mailed back to

Arkansas, confer *in personam* jurisdiction of the Arkansas courts over the Texas resident consistent with due process of law?

2. Do the activities of a Texas corporation, through its agent, in Arkansas, confer *in personam* jurisdiction over officers, directors and/or employees of the Texas corporation who were never in Arkansas relative to any corporate business or transaction?

3. Can the courts of Arkansas ignore the holdings of the federal courts on the issue of due process of law under the U.S. Constitution?

PARTIES

The parties to this proceeding are H. Wayne Meachum, Petitioner herein, and Worthen Bank & Trust Company, N.A., Respondent.

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The judgment of the Circuit Court of Faulkner County, Arkansas (the trial court) is printed in Appendix A hereto, *infra*, page 15a. The opinion of the Arkansas Court of Appeals is reported at 682 S.W.2d 763 and is printed in Appendix A hereto, *infra*, page 7a. The Dissenting Opinion is at page 4a. The Denial of Petition for Review by the Arkansas Supreme Court is printed in Appendix A hereto, *infra*, page 1a, 2a.

JURISDICTION

The judgment of the Arkansas Court of Appeals was entered on January 16, 1985. A timely Petition for Rehearing was denied on February 13, 1985 (Appendix A hereto, *infra*, page 3a). The Arkansas Supreme Court denied Petitioner's Petition for Review on March 11, 1985. The jurisdiction of the Supreme Court is invoked under the provisions of Title 28, U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the denial to Petitioner of his rights of due process of law guaranteed to him, and all United States citizens, under the Fourteenth Amendment of the United States Constitution which provides, in pertinent part, as follows, to-wit:

> ". . .nor shall any state deprive any person of life, liberty or property, without due process of law; . . ."

Also involved is Article 27-2502, C, 1, (a), Arkansas Statutes, which provides, to-wit:

"* * *

C. Personal jurisdiction based on conduct.

1. A court may exercise personal jurisdiction over a person, who acts directly or by agent, as to a (cause of action) (claim for relief) arising from the person's

a. transacting any business in this state;

* * *"

STATEMENT OF THE CASE

The undisputed facts, to which no contrary evidence has ever been presented, show that Petitioner, who at all times relevant hereto was an officer, director and employee of CMC, a Texas corporation, was requested by one James Sizemore, marketing director of CMC, to sign as guarantor of a lease agreement between Telecompo of Arkansas (with which CMC had a business relationship) and Worthen Bank & Trust ("Worthen Bank", hereinafter), both Arkansas corporations. The agreement was mailed to Petitioner in Texas, signed by him in Texas and mailed back to Arkansas along with Petitioner's financial statement. The lease agreement, which provided for financial arrangements under which Telecompo of Arkansas ("Telecompo," hereinafter) acquired computer equipment for use in Arkansas, was negotiated by Sizemore, Telecompo and Worthen Bank in Arkansas. Petitioner was never in Arkansas in any capacity. *The only act done by Petitioner in his individual capacity was the signing of the guaranty in Texas.*

When Telecompo defaulted on the lease, Respondent, Worthen Bank, sued Petitioner, and others, in Circuit Court of Faulkner County, Arkansas, and obtained a default judgment against Petitioner in 1980. Petitioner filed a Motion to Set Aside Judgment by Default in 1981 in

which he raised, for the first time, the issue of lack of personal jurisdiction over him by the Arkansas court (Appendix A hereto, *infra*, page 22a). After the default judgment was set aside, Petitioner again urged the lack of personal jurisdiction in his Answer filed October 1, 1982 (Appendix A hereto, *infra*, page 18a). When the trial court held jurisdiction over Petitioner, the case was appealed on that issue, as well as others.

The Arkansas Court of Appeals affirmed the judgment of the trial court finding that,

> "[Petitioner] was extensively involved with CMC as director, officer and general counsel, and CMC was directly responsible for the formation of Telecompo, the lessee corporation. Telecompo was formed in Arkansas and [Petitioner] personally drafted its articles of incorporation and mailed them to Arkansas. CMC was also instrumental in the negotiation and execution of the lease agreement between [Worthen Bank] and Telecompo and [Petitioner's] individual guaranty was clearly required by [Worthen Bank] because of his extensive involvement with CMC. *These same facts also indicate that the court's exercise of personal jurisdiction was consistent with due process.*" (Appendix A hereto, *infra*, page 9a, emphasis added.)

In spite of a clear, strong and logical dissent by two of the five justices of the Arkansas Court of Appeals, in which it was pointed out that the "contacts sufficient to confer jurisdiction on this State are simply non-existent" (Appendix A hereto, *infra*, page 5a), the Arkansas Supreme Court denied Petitioner's Petition for Review (Appendix A hereto, *infra*, page 1a, 2a).

REASONS FOR GRANTING WRIT

As amplified upon in the argument set forth hereinafter, the writ sought hereby should be granted for the following reasons:

1. There is a clear conflict of law between the Arkansas Supreme Court and the United States Eighth Circuit Court of Appeals on the issue of personal jurisdiction/due process of law under the facts present in the instant case. The conflict cannot be accounted for on the basis of factual distinctions in the cases as any distinctions are clearly in the favor of Petitioner.

2. There is, presently, no other case pending to resolve the existing conflict between the federal and Arkansas state jurisdictions.

3. The federal courts are bound to follow the holding of the Eighth Circuit Court of Appeals and all state courts in Arkansas are bound to follow the Arkansas Supreme Court holding. Further conflicts are certain to develop.

4. This is a case of general national importance in that all states have long arm statutes which attempt to define the extent of a state's judicial jurisdiction.

5. Any corporation engaging in a transaction with an Arkansas resident (individual or corporate) must now face the prospect of having their officers, directors and/or employees found to be subject to the personal jurisdiction of the courts of Arkansas which, as pointed out above, is directly in conflict with the holding of the United States Eighth Circuit Court of Appeals on the same facts.

6. State courts should not be allowed to ignore the holdings of federal courts on the issue of due process of law under the United States Constitution.

7. Petitioner's rights of due process have been violated.

ARGUMENT AND AUTHORITIES

The Due Process Clause of the Fourteenth Amendment to the United States Constitution limits the power of a state court to render a valid personal judgment against a non-resident defendant. *World-Wide Volkswagen Corporation v. Woodson*, 100 S. Ct. 559 (1980) ("*Woodson*," hereinafter); *Kulko v. Superior Court*, 98 S. Ct. 1690 (1978) ("*Kulko*," hereinafter). A judgment rendered in violation of due process is void in the rendering state and is not entitled to full faith and credit elsewhere. *Woodson, supra.*; *Pennoyer v. Neff*, 95 U.S. 714 (1878). Due process requires that a defendant be subject to the personal jurisdiction of the court. *International Shoe Co. v. Washington*, 66 S. Ct. 154 (1945) ("*International Shoe*," hereinafter); *Woodson, supra.*

It has long been settled that a state court may exercise personal jurisdiction over a non-resident defendant *only* so long as there exists "minimum contacts" between the defendant and the forum state. *Woodson, supra.*; *International Shoe, supra.* The concept of minimum contacts is seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum and it acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. *Woodson, supra.*

All assertions of state-court jurisdiction must be evaluated according to the standards set forth in *Inter-*

national Shoe and its progeny. *Shaffer v. Heitner*, 97 S. Ct. 2569 (1977) ("*Shaffer*", hereinafter); *Rush v. Savchuk*, 100 S. Ct. 571 (1980) ("*Rush*," hereinafter). That is, a state may exercise jurisdiction over an absent defendant only if the defendant has certain minimum contacts with the forum state such *that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe, supra.; Rush, supra.* Each case of *in personam* jurisdiction over a non-resident defendant must be decided on its own facts. *Perkins v. Benquet Consolidated Mining Co.*, 72 S. Ct. 413 (1952). But it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *International Shoe, supra.; Hanson v. Denckla*, 78 S. Ct. 1228 (1958).

Leading Case Authority

The Arkansas "long-arm" statute, Article 27-2502 of the Arkansas Statutes, provides in pertinent part:

> "* * *
>
> C. Personal jurisdiction based conduct.
>
> 1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's
>
> (a) transacting any business in this state;
>
> * * *"

Under the undisputed facts previously set forth herein (as revealed in the transcript and Statement of Facts of the trial court's proceeding in this cause), the Arkansas courts held that Petitioner was subject to *in personam* jurisdiction under the provision of the Arkansas "long-

arm" statute. Such a finding and holding by the Arkansas courts is wholly contrary to the law relating to *in personam* jurisdiction under the said statute today and at the time the guaranty was signed by Petitioner.

Although there are no Arkansas state court cases factually on point with the instant case, construing the Arkansas "long-arm" statute, the Eight Circuit U.S. Court of Appeals case of *Arkansas Poultry Cooperative, Inc. v. Red Barn Systems, Inc.*, 468 F. 2d 538 (8th Cir. 1972) ("*Arkansas Poultry*," hereinafter) is directly on point with the case at bar, there being no material factual differences between the two cases. In *Arkansas Poultry*, a guaranty agreement had been executed by Red Barn (the defendant), a foreign corporation, guaranteeing to Arkansas Poultry (the plaintiff), an Arkansas corporation, the debt of Ollie's Chicken, Inc., a Missouri corporation. The guaranty agreement had been mailed by Arkansas Poultry to Red Barn in Florida, rewritten and executed by Red Barn, then mailed back to Arkansas Poultry in Arkansas. After default by Ollie's, both Red Barn and Arkansas Poultry met in Arkansas in an attempt to settle the alleged outstanding debt. When no settlement was reached, Arkansas Poultry sued and Red Barn filed a motion to dismiss for lack of personal jurisdiction. The trial court denied the motion and Red Barn appealed.

Before the Eighth Circuit U.S. Court of Appeals, Arkansas Poultry relied on the case of *Thompson v. Ecological Science Corp.*, 421 F.2d 467 (8th Cir. 1970) in which *in personam* jurisdiction over a non-resident defendant was upheld, for construction of the Arkansas "long-arm" statute. The Court distinguished the *Thompson* case from the *Arkansas Poultry* case by noting that, in the *Thompson* case, the pervasive contact with the State of Arkansas was "the negotiations leading up to the execution of the actual contract with took place solely in

Arkansas" (*Arkansas Poultry, supra.*, at p. 540), whereas, "[i]n the instant cause [*Arkansas Poultry*] the salient contractual negotiations took place outside of the state of Arkansas." *Arkansas Poultry, supra.*, at p. 540.

Determining the existence of *in personam* jurisdiction is a two-fold inquiry. First, the court must decide whether Petitioner's actions satisfied the "transacting business" requirement within the meaning of Ark. Stat. Ann. §27-2502 and, second, whether the exercise of *in personam* jurisdiction is consistent with due process under the Fourteenth Amendment to the United States Constitution. *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651 (8th Cir. 1982). The Arkansas courts' finding of *in personam* jurisdiction over Petitioner offends both due process and the Arkansas "long arm" statute.

Petitioner did not have the requisite minimum contacts with Arkansas to grant to the Arkansas courts jurisdiction over him consistent with his constitutionally guaranteed rights of due process of law. Therefore, the judgment rendered by the Arkansas courts is void. The evidence is uncontroverted that Petitioner, a Texas resident, has never transacted business in Arkansas or contracted to supply services or things in that state. He neither does nor solicits business in Arkansas, engages in any other persistent course of conduct in that state nor derives substantial revenue from goods consumed or services used in that state.

It is undisputed that Petitioner has never been physically present in the State of Arkansas in any capacity related to the transaction in issue. The lease agreement signed by Petitioner in the capacity as a guarantor of payment was negotiated, with respect to Petitioner, in the State of Texas with any action by him in connection therewith to be performed in Texas. The said lease

agreement and accompanying guaranty were hand delivered to Petitioner in Dallas, Texas by Mr. Sizemore. The guaranty was executed in Dallas, Texas.

Transacting Business

The first inquiry must be, "was Petitioner transacting business in Arkansas within the meaning of Ark. Stat. Ann. §27-2502?" In *Jagitsch v. Commander Aviation Corp.*, 655 S.W.2d 468, the Arkansas Court of Appeals said:

> Arkansas Statutes Annotated §27-2502(C)(1)(a) (Repl. 1979) provides that a trial court may exercise *in personam* jurisdiction over a person as to a cause of action arising from a non-resident "transacting any business in this State." The purpose of the "transacting business" provision is to permit the trial court to exercise the maximum personal jurisdiction over non-resident defendants allowable by due process, *Wisconsin Brick and Block Corp. v. Cole*, 274 Ark. 121, 622 S.W.2d 192 (1981), and should be given a broad and liberal interpretation. *Pennsalt Chemical Corp. v. Crown Cork and Seal Co.*, 244 Ark. 638, 426 S.W.2d 417 (1968). *Jagitsch, supra.*, at page 469.

As was stated earlier, Petitioner was not the lessee but, rather, a guarantor. He had no contact with the lessee Telecompo or the lessor Worthen Bank during the lease negotiations. His only contact with Worthen Bank was to forward to Worthen Bank his financial statement and his signing of the guaranty. Petitioner had no contact with the State of Arkansas. Here, Worthen Bank told Sizemore that it would not enter into the transaction unless Petitioner signed the guaranty in issue. Mr. Sizemore explained Worthen Bank's position to Petitioner in Dallas, Texas and Petitioner signed the guaranty in Dallas, Texas. It is inconceivable how the signing of the guaranty in Dallas, Texas could be construed as "transacting business" in Arkansas.

Whether a non-resident guarantor was "doing business" in Arkansas was the question before the U.S. Eighth Circuit Court in *Arkansas Poultry, supra.*, As noted above, the Court held that the signing of the guaranty and attendant correspondence were not sufficient contacts necessary to invoke *in personam* jurisdiction over Red Barn under the Arkansas "long-arm" statute, §27-2502 C(1)(a). The Eighth Circuit Court distinguished between other holdings in which jurisdiction was found under the Arkansas "long-arm" statute pointing out that, in those cases where such jurisdiction was found, the negotiations leading up to the execution of the actual contract took place in Arkansas. No such negotiations occurred here.

Petitioner's relationship to CMC does not result in *in personam* jurisdiction. That issue was raised in the case of *Frank v. Steel*, 485 S.W. 2d 737 (S. Ct. Ark. 1972). In the *Frank* case, the issue before the Arkansas Supreme Court was whether the non-resident, Walter J. Frank, Jr., was subject to the personal jurisdiction of the Circuit Court of Sevier County, Arkansas under the provisions of the Arkansas "long arm" statute. The case involved a suit by C. Henry Platt of the State of Arkansas against International Distributing Company, a Louisiana corporation, Walter J. Frank, Jr., and another defendant. Platt, as a result of negotiations with an agent of International Distributing Company (not Frank), signed, at his home in Arkansas, a proposal to purchase some goods to be shipped from International. The contract assigned an exclusive sales area to Platt and was accepted by International at its home office in Monroe, Louisiana over the signature of its President, Walter J. Frank, Jr. Platt admitted that he had never talked to Frank in person in the State of Arkansas and that he had never seen Frank in the State of Arkansas. The parties stipulated that International Distributing Company was a corporation

validly existing under the laws of the State of Louisiana but not authorized to do business in Arkansas.

Noting and distinguishing the cases of *Wichman v. Hughes*, 450 S.W.2d 294 (S. Ct. Ark. 1970), *Nix v. Dunavant*, 460 S.W.2d 762 (S. Ct. Ark. 1970) and *Pennsalt Chemical Corporation v. Crown Cork and Seal*, 426 S.W.2d 417 (S. Ct. Ark. 1968) (all of which were relied upon by Worthen Bank in the Arkansas courts) the Arkansas Supreme Court held that, while the Louisiana corporation had purposely availed itself of the privilege of conducting activities in Arkansas, there were no facts that would warrant the acquisition of personal jurisdiction over the individual who only acted in his representative capacity as President of the Louisiana corporation in accepting the contract. Platt also argued before the Arkansas Supreme Court that Walter J. Frank, Jr. could be subject to jurisdiction of the Arkansas courts because he was personally liable as an officer of an unqualified foreign corporation unlawfully entering into contracts in the State of Arkansas. The Court stated:

> "Here again the facts do not support respondent because they show that whatever petitioner (Walter J. Frank, Jr.) did, he did in the State of Louisiana." *Frank v. Steel, supra.*, at page 738.

It is difficult to imagine a clearer statement of the law or a more applicable precedent for the instant case. Here, as in *Frank*, whatever Petitioner did he did in the State of Texas. Clearly, Petitioner transacted no business in Arkansas. For that reason, the Arkansas courts are without jurisdiction and the judgment rendered against Petitioner is void.

Due Process Protection

Even if Petitioner were "transacting business" in Arkansas (which is vehemently denied) the exercise of

jurisdiction here would not be consistent with due process under the Fourteenth Amendment to the United States Constitution. The U.S. Eighth Circuit Court of Appeals in *Mountaire, supra.*, and the Arkansas Court of Appeals in *Jagitsch, supra.*, found that the non-resident defendant in each case was "transacting business" within Arkansas. Both courts then went on to the second issue, *i.e.*, determining whether the application of the Arkansas "long arm" statute in the case before it violated due process. The logic for this two-step process is set forth in *Jeanway Industries v. Knudson Mfg. Co., Inc.*, 533 F.Supp. 678 (W. D. Ark. 1981) which says: "It is only when state law authorizes long-arm service that the court must analyze whether or not the exercise of such jurisdiction would offend due process." *Id.* at 682.

In analyzing the issue, the Arkansas Court of Appeals held in *Jagitsch:*

> The United States Supreme Court has held that a State may exercise *in personam* jurisdiction over non-resident defendants if "minimum contracts" exist between the defendants and the forum State. The appellees must have performed "some act by which [they have] purposefully [availed themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). See *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F. 2d 1211 (8th Cir. 1977). The contacts with the forum State must be such that the non-resident defendants should reasonably anticipate being "hauled" into an Arkansas court. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). These rules apply equally to non-resident buyers and sellers. See *Mountaire Feeds, Inc., supra.*

> There is no exact formula for what is reasonable and fair under the circumstances. In *Arkansas-Best Freight System, Inc. v. Youngblood*, 359 F.Supp. 1115 (W.D. Ark. 1973), citing *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965), the court outlined five factors to be considered in determining whether due process requirements have been satisfied:
>
> > (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience to the parties." At page 470.

In *Mountaire*, the Eight Circuit Court said the critical relationship is that "among the defendant, the forum and the litigation." *Mountaire, supra.*, at 654.

That court noted that it was the non-resident's contacts with the state that are of interest in determining if *in personam* jurisdiction exists, not the non-resident's contacts with a resident. The court also said:

> Although the parties did make telephone calls, exchange correspondence, and use banks to arrange payment, "the use of arteries of interstate mail, telephone, railway and banking facilities is insufficient, standing alone, to satisfy due process." *Aaron Ferer & Sons v. Atlas Scrap Iron & Metal Co.*, 558 F.2d at 453; see *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F.Supp. 902, 905-06 (D. Minn. 1971) (payment of purchase price in forum state insufficient to support long-arm jurisdiction). *Id.* at 656.

The critical inquiry here is Petitioner's relationship with Arkansas. *It is Petitioner's lack of contacts with Arkansas, not his scanty contacts with Worthen Bank, that are meaningful.* The court in *Mountaire* expressly held

that the actions of others, *i.e.*, Worthen Bank, CMC, Sizemore, and Telecompo, do not result in jurisdiction over non-residents such as Petitioner. The *Steel* court held similarly. The mere signing of the guaranty does not result in jurisdiction. The court in *Mountaire* addressed that specific question when it said, "Merely entering into a contract with a forum resident does not provide the requisite contacts between a (non-resident) defendant and the forum State." *Mountaire*, at 655. The Eighth Circuit Court went on to say that *the making of telephone calls, exchange of correspondence and the like do not, standing alone, satisfy the due process requirement.* Like Agro Impex, S.A. in *Mountaire* and Commander Aviation Corp. in *Jagitsch*, Petitioner was never in Arkansas in connection with the lease or the guaranty. Clearly, the absence of contacts between Petitioner and Arkansas coupled with Petitioner's lack of presence in Arkansas must lead this Honorable Court to conclude that there are insufficient "minimum contacts" between Arkansas and Petitioner as are required by due process to support the exercise of personal jurisdiction over him by the courts of Arkansas.

Such is the law with respect to the Arkansas "long-arm" statute and such was the law with respect to that statute when the guaranty was signed by Petitioner.

Other Jurisdictions in Accord

The U.S. Eighth Circuit Court of Appeals is not the only jurisdiction to reach such a determination under facts such as those presented in the *Arkansas Poultry* and *Mountaire* cases and the case at bar.

In the case of *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257 (10th Cir. 1971), the United States Court of Appeals for the Tenth Circuit held that an Oklahoma resident's execution of a guaranty of payment contract in Oklahoma

in connection with payments which were to have been made by an Oklahoma lessee of equipment leased by a Kansas lessor, even though the basic lease was to be governed by Kansas law and lease rentals were payable in Kansas, was not transacting business within the Kansas "long arm" statute. The plaintiff, a Kansas corporation, sued the defendant, an Oklahoma resident, in the United States District Court for the District of Kansas and received a default judgment against the Oklahoma resident guarantor on February 1, 1968. On August 5, 1970, the Oklahoma resident filed suit in Federal District Court to vacate the judgment. The trial court found that the plaintiff prepared the guaranty agreement in its office in Wichita, Kansas and forwarded the same to an individual in Oklahoma City with instructions that he obtain the signatures of the guarantors. That individual went to the office of the defendant in Oklahoma City and obtained his signature as a guarantor on the lease agreement. The trial court further found that the default judgment defendant was never present in Kansas in connection with the guaranty. On these findings, the trial court concluded that the defendant had not been shown to have transacted any business in Kansas under the Kansas "long arm" statute. The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court granting the motion of the Oklahoma defendant to vacate the default judgment for lack of personal jurisdiction. The court stated that:

> "Since Keller had no physical contact with Kansas, and since there was no contact through an agent, jurisdiction is wholly dependent on his execution of the guaranty contract in Oklahoma. This is insufficient basis for holding that he transacted business so as to be subject to the operation of the long-arm statute." (450 F.2d, at p. 260).

On facts almost identical to those in the *Misco* case, the Kansas Supreme Court came to the same conclusion in the case of *White vs. Goldthwaite*, 460 P.2d 578 (S. Ct. Kansas 1969).

In *Sibley v. Superior Court of Los Angeles County*, 546 P.2d 322 (S. Ct. Cal. 1976), the California Supreme Court held that a Florida resident's execution of a guaranty of performance of a Georgia corporation which entered into a partnership with a California partnership formed to operate mobile home parks was not sufficient to grant *in personam* jurisdiction over the Florida resident by the courts of California *even though* such guaranty may have caused "effects" in California.

Further, the Supreme Court of Nevada, citing with approval the *Arkansas Poultry* case, held in *Basic Food Industries, Inc. v. The Eighth Judicial District Court of the State of Nevada*, 575 P.2d 934 (S. Ct. Nev. 1978), that a non-resident defendant who executed a guaranty and mailed it into the State of Nevada, having neither negotiated nor signed it in Nevada, could not be subjected to *in personam* jurisdiction of the courts of the State of Nevada under the Nevada long-arm statute.

Recent United States Supreme Court Decisions

Consideration of any constitutional issue requires an examination and analysis of the most recent decisions of the U.S. Supreme Court dealing with that issue, such examination and analysis being undertaken in an effort to determine from the decisions of the Court the trends or direction of the law relating to the constitutional issue being considered.

Between 1977 and 1984 this Court decided five significant cases on personal jurisdiction of non-resident de-

fendants based on minimum contacts. Read together, those five cases narrowed the reach of "long-arm" jurisdiction and clearly established the "minimum contacts" test as the measure of the proper exercise of state-court jurisdiction over non-residents.

In *Shaffer v. Heitner*, previously cited herein, the U.S. Supreme Court held that Delaware's assumption of jurisdiction over non-resident defendant corporate officers and directors of the Greyhound Corporation, sued in a shareholder's derivative suit, was a violation of due process under the minimum-contacts test. Justice Marshall, writing for the majority, held that the forum's seizure of the defendants' Greyhound stock through a writ of sequestration must be scrutinized constitutionally, not by establishing property situs in the forum but, instead, by examining the contacts "among the forum state, the defendant, and the litigation." *Shaffer, supra.*, at p. 207. By disregarding the Delaware situs of shares on the record books of Greyhound, a Delaware corporation, this approach revolutionized personal jurisdiction by requiring "all assertions of state-court jurisdiction . . . [to] be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer, supra.*, at p. 212. The Court found the presence of the defendants' shares of stock within the forum to be an unsatisfactory basis of jurisdiction.

In *Kulko v. California Superior Court*, previously cited herein, the U.S. Supreme Court held that California could not constitutionally assert jurisdiction over a non-resident New York defendant in order to modify custody and child-support obligations. The New York father had been given custody of the two children of the marriage in 1972. In 1973, the father voluntarily relinquished custody of his daughter, allowing her to move to California to live with the mother. In 1976, the other child, a son, also went

to California to live with the mother. The California mother then filed suit to increase child support and to obtain full custody of the children.

The California Supreme Court found that the defendant father's act of sending his daughter to California justified personal jurisdiction, *because the defendant's action caused effects in the forum state* and constituted reliance on California "police and fire protection, its school system, its hospital services, its recreational facilities." *Kulko v. California Superior Court*, 19 Cal. 3d 514, at p. 522.

As was the case in *Shaffer*, the U.S. Supreme Court in *Kulko* utilized a narrow approach to the reliance-on-forum-law requisite. Justice Marshall rejected the argument that the defendant purposefully availed himself of the benefit of California law just by sending his daughter to California, "in the interest of family harmony and his children's preferences." *Kulko, supra.*, at p. 94. In Justice Marshall's opinion, the single act of sending the daughter to California could not create the defendant's reasonable anticipation of being haled before the California court.

In *World-wide Volkswagen Corp. v. Woodson*, previously cited herein, the U.S. Supreme Court held that Oklahoma could not constitutionally assert jurisdiction over a non-resident New Jersey Audi auto retailer and a New York Audi regional distributor sued regarding an automobile accident in Oklahoma during a move by the plaintiffs, purchasers of an Audi automobile from the New Jersey Audi retailer, from New York to Arizona.

Justice White, writing for the majority, acknowledged that the "limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years," largely due "to a fundamental transformation in the American economy." *Woodson, supra.*, at p. 292. Yet, the Court refused to accept that that trend had

eroded the significance of individual state sovereignty. In a detailed philosophical section, the Court referred to the "sovereign [state] power to try causes in their courts," and "principles of interstate federalism" and emphasized the independent role of the states in providing "orderly administration of the laws" by placing limits upon personal jurisdiction. *Woodson, supra.*, at p. 293. Justice White specifically observed that these sovereignty policies were weighty enough to prevent the assumption of jurisdiction despite a strong state interest and a convenient forum.

The sole minimum-contact determinant, carefully discussed by Justice White, was whether the defendants purposefully had availed themselves of forum law. The plaintiff argued that the auto's mobility made an Oklahoma injury foreseeable. Justice White required the level of foreseeability to be great enough to cause a reasonable anticipation of being subject to a suit in a distant forum. *Woodson, supra.*, at p. 297. For a non-resident defendant to be constitutionally subjected to suit, he must have "clear notice" that he was sueable in a state in order to permit him to take steps to insure against such suit or to restrict his business activities by severing ties with that state. *Woodson, supra.*, at 297.

After the *Woodson* case, it is plain that this Court requires a substantial degree of contact between the defendant and the forum before the requisite "clear notice" of potential suits in a distant forum is satisfied.

On the same day that the *Woodson* case was decided, the U.S. Supreme Court also decided *Rush v. Savchuk*, previously cited herein, which struck down as a violation of due process Minnesota's exercise of personal jurisdiction over an Indiana resident whose only contact with Minnesota was the forum presence of his automobile insurer, State Farm. The Minnesota plaintiff had initiated the

suit by attaching State Farm's contractual obligation to defend and indemnify the Indiana defendant. The Minnesota Supreme Court upheld personal jurisdiction, since the claim did not exceed the defendant's policy limits and since, unlike the situation in *Shaffer*, the seized property—the insurance policy—was central to the litigation.

Justice Marshall, again writing for the majority, applied the minimum-contacts criteria to a case that, before *Shaffer*, would have been predicated jurisdictionally upon the presence of property within the forum. Justice Marshall believed it "unlikely that [the defendant] would have expected that by buying insurance in Indiana he had subjected himself to suit in any state to which a potential future plaintiff might decide to move." *Rush, supra.*, at p. 329. Accordingly, the defendant had engaged in no purposeful activity in the forum state.

Finally, in *Helicopteros Nationales de Columbia, S.A. v. Hall*, 104 S. Ct. 1868 (1984), this Court clearly reaffirmed the "minimum-contacts" test as the measure of activity necessary to allow the exercise of personal jurisdiction by state courts over non-resident defendants.

All of the significant Supreme Court minimum-contacts decisions decided in the last decade hold that a state has exceeded its reach over non-residents and violated due process. With these cases, the Court has adopted an unwavering doctrine requiring that all cases be scrutinized under the *International Shoe* minimum-contacts formula. However, the Court has retained an emphasis on state sovereignty by stressing federalism in limiting a state's jurisdictional sweep. Sovereign states, by necessity, must have territorial boundaries.

Reading the five cases together, the U.S. Supreme Court requires a realistic nexus between a forum and a non-resident defendant; a state cannot exercise its jurisdictional sovereignty in a casual fashion. In particu-

lar, only those forum state interests clearly specified in state legislation may be considered. Similarly, the potentially easy-to-satisfy requisite of a defendant purposefully availing himself of forum law has been narrowed to require the defendant's forum contacts to create a reasonable anticipation of defending litigation in a distant forum. Clear notice of the possibility of defending a distant suit now seems mandatory.

Applying the Supreme Court "Minimum Contacts" Principles to the Instant Case

Under the principles set forth in the recent United States Supreme Court cases dealing with jurisdiction over non-resident defendants based upon the minimum-contacts test, there could be no finding of such jurisdiction by the state courts of Arkansas over Petitioner herein.

There is no "realistic nexus" between the forum state, the State of Arkansas, and Petitioner. The State of Arkansas has not clearly specified in legislation a state interest in compelling *in personam* jurisdiction over a non-resident defendant in the position of Petitioner herein. Indeed, the *Arkansas Poultry* case was decided by the United States Court of Appeals for the Eighth Circuit in 1972. If that decision abridged or threatened in any way some Arkansas state interest, the legislature of the State of Arkansas has had ample time to express that interest clearly and specifically in state legislation, but has failed to do so. On the contrary, the state legislature of Arkansas has not even modified the pertinent provisions of its long-arm statute, which provision was construed in the *Arkansas Poultry* case as failing to extend *in personam* jurisdiction by the state courts of Arkansas over one in the position of the defendant in that case, that being the same position as that of Petitioner in the case at bar.

In addition, there is nothing which could have given Petitioner herein "clear notice" of the possibility of defending a lawsuit in the State of Arkansas and Petitioner had no reason to "reasonably anticipate" that he would be required to do so. Indeed, in light of the prevailing law at the time of the signing of the guaranty agreement herein, Petitioner had every reason to reasonably anticipate that he could not be compelled to defend litigation pertaining to that guaranty agreement in the State of Arkansas.

The "minimum contacts" test simply is not met under the facts of this case. The Arkansas courts did not properly exercise jurisdiction over Petitioner. The judgment entered against Petitioner by the Arkansas courts is void.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

H. Wayne Meachum, *Pro Se*

APPENDIX A

LAW OR CHANCERY MANDATE

State of Arkansas
In the Supreme Court } SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A.D. 1984, amongst others were the following proceedings, to-wit:

On the 11th day of March, A.D. 1985, a day of said term

H. WAYNE MEACHUM
Appellant

No. 85-19 *vs.*

WORTHEN BANK & TRUST COMPANY, N.A.
Appellee

APPEAL FROM FAULKNER
CIRCUIT COURT
_____DISTRICT

Petition for Review is denied. Hickman, J., concurs.

SUPREME COURT OF ARKANSAS

No. 85-19

Opinion Delivered March 11, 1985

H. WAYNE MEACHUM,
Petitioner,

V.

WORTHEN BANK & TRUST COMPANY, N.A.
Respondent.

ON DENIAL OF PETITION FOR REVIEW

Concurrence

DARRELL HICKMAN, Associate Justice

I write merely to note that at the first opportunity I intend to reexamine the holding in *SD Leasing, Inc. v. Al Spain & Assoc., Inc.*, 277 Ark. 178, 640 S.W.2d 451 (1982).

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

February 13, 1985

Peter B. Heister
Attorney at Law
One Spring Street, Suite 330
Little Rock, AR 72201

RE: CA83-468 H. Wayne Meachum v. Worthen Bank and Trust Company, N.A.

Dear Mr. Heister:

The Arkansas Court of Appeals made the following order today in the above styled case:

> "Petition for Rehearing is denied. Corbin and Glaze, JJ., would grant the petition."

Sincerely yours,

Dona L. Williams, Clerk

EN BANC

ARKANSAS COURT OF APPEALS

No. CA 83-468

Opinion Delivered January 16, 1985

H. WAYNE MEACHUM
Appellant

v.

WORTHEN BANK & TRUST COMPANY, N.A.
Appellee

Dissenting Opinion

TOM GLAZE, Judge

I must dissent. Our Supreme Court in *SD Leasing, Inc. v. Howell Spain & Associates, Inc.*, 277 Ark. 178, 640 S.W.2d 451 (1982), held that this State's long-arm statute conferred jurisdiction on an Arkansas court by the completion of the contract in Arkansas although prior negotiations and the contract's subject matter were in another state. Dr. Robert A. Leflar politely referred to *SD Leasing* as a "marginal case." *See* Leflar, *Conflict of Laws: Arkansas, 1978-82*, 36 Ark.L.Rev. 191, 195 (1982-83). *Webster's New Collegiate Dictionary* defines "marginal" as close to the lower limit of qualification, acceptability, or function. If the *SD Leasing* case is marginal, I must say the instant case clearly falls short of the minimum contacts—or if you will the lower limit of qualification--necessary to confer jurisdiction on Arkansas. Although the majority opinion refers to "appellant's con-

tacts with Arkansas being few," I submit that the contacts sufficient to confer jurisdiction on this State are simply non-existent.

In reviewing this case, the reader must keep in mind that this Court is affirming the trial court's decision finding the appellant, a Texas resident, liable as a *personal* guarantor of a lease agreement between two Arkansas corporations. Appellant's only contact with these Arkansas corporations was by virtue of his relationship with Composition Management Company (CMC), a Texas corporation. He was CMC's general counsel and one of its officers and directors. Admittedly, Jerry Sizemore, CMC's Marketing Director, came to Arkansas and negotiated the sale of two computers to the appellee Worthen Bank which, in turn, leased the equipment to the second Arkansas corporation, Telecompo. Worthen Bank required several guarantees regarding its lease with Telecompo; one was required of the appellant. Appellant's only involvement with the leasing arrangements that took place in Arkansas was his mailing a financial statement and lease-guarantee to Worthen Bank.

No one questions Arkansas' jurisdiction over CMC, most likely because CMC (through Sizemore) conducted the business negotiations in Arkansas that led to the lease which was executed and performed in this State.

Indisputably, the appellant was never physically within the State of Arkansas. The financial forms (including the individual guarantee) were prepared in Arkansas and mailed to the appellant in Texas. Upon receipt of these instruments, appellant signed and returned them by mail. It is also unrefuted that appellant never personally participated in any of the negotiations in Arkansas that led to the lease in controversy.

The majority opinion relies on the fact that appellant was involved with CMC as a director, officer and general counsel and that CMC was directly responsible for the formation of Telecompo. Obviously, appellant had a close connection with CMC, but I am puzzled how my colleagues can parlay CMC's contacts with this State into exercising *in personam* jurisdiction over appellant. Again, the majority in part relies upon *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), stating that "appellant should have reasonably anticipated being haled into court in Arkansas if the lease went into default." Of course, appellant's expectations or anticipations are not the benchmark for determining whether his contacts with Arkansas were sufficient to withstand a due process challenge to the exercise of *in personam* jurisdiction over him.

In sum, the majority opinion is premised on appellant's relationship with CMC to substantiate this Court's decision to extend *in personam* jurisdiction over him. Unquestionably, we have fewer contracts here than in *SD Leasing*.

Under the test of minimum contacts and fair play, I am convinced that Arkansas' assumption of *in personam* jurisdiction over appellant violates his due process rights. I cannot conceive of our Supreme Court's interpreting its long-arm statute to gather-in out-of-state residents who, like appellant, have virtually no personal contacts with our State's borders.

I would reverse,

I am authorized to state that Corbin J., joins in this dissent.

EN BANC

ARKANSAS COURT OF APPEALS

No. CA 83-468

Opinion Delivered January 16, 1985

H. WAYNE MEACHUM
Appellant

APPEAL FROM FAULKNER CIRCUIT COURT

v.

WORTHEN BANK & TRUST COMPANY, N.A.
Appellee

HONORABLE GEORGE F. HARTJE, JUDGE

Affirmed

MELVIN MAYFIELD, Judge

This is an appeal from a trial judge's decision that found the appellant, H. Wayne Meachum, liable as guarantor of a lease agreement between Telecompo of Arkansas and the appellee, Worthen Bank & Trust Company.

Evidence not in dispute reveals that appellant is an attorney who resides and practices in Dallas, Texas. He is also an officer, a director, and general counsel of Composition Management Company (CMC), a Texas corporation with its principal place of business in Dallas. CMC was intended to be the center for a network of outlying stations which would feed data to CMC for computerized typesetting. CMC's marketing director, Jerry Sizemore, negotiated with Arkansas resident Charles Thornton, who agreed to set up a station in Conway, Arkansas, with CMC providing part of the financing. Pursuant to this agreement, Thornton formed Telecompo of Arkansas. CMC

then purchased two computers and allied items and sold them for $19,936.68 to the appellee, Worthen Bank, whose leasing agent, First Arkansas Leasing Corporation (FALCO), in turn leased the equipment to Telecompo. Before agreeing to purchase and lease the equipment, the appellee required several guaranties including the individual guaranty of appellant. The appellant sent his financial statement to the appellee and then signed the lease guaranty in Dallas in his individual capacity and as an officer for CMC.

Telecompo subsequently defaulted on the lease agreement. Six months later the appellee repossessed the equipment and sixteen months after repossession the equipment was sold for $1,000.00. Meanwhile, the appellee instituted this action on the lease agreement and on trial the court found Telecompo and each of the individual guarantors jointly and severally liable for the amount of the remaining lease payments minus the $1,000.00 received from the sale.

The trial court found jurisdiction over the appellant based on our long-arm statute, Ark. Stat. Ann. §27-2502 (Repl. 1979), which states that a trial court may exercise personal jurisdiction over a person as to a cause of action "arising from the person's . . . transacting any business in this State . . ." The appellant's first argument on appeal is that he did not transact any business in Arkansas within the meaning of the statute and, therefore, the trial court erred in finding that it had personal jurisdiction over him. We do not agree.

It has been held that each question of jurisdiction must be decided on a case-by-case basis. *Gardner Engineering Corp. v. Page Engineering Co.*, 484 F.2d 27 (8th Cir. 1973). In *Jagitsch v. Commander Aviation Corporation*, 9 Ark. App. 159, 655 S.W. 2d 468 (1983), this court set out the two-part analysis to be used in determining whether a

trial court had jurisdiction over a non-resident defendant. First, we must decide whether the non-resident's actions satisfy the "transacting business" requirement of our long-arm statute and, second, we must decide whether the exercise of *in personam* jurisdiction is consistent with due process.

The Arkansas legislature intended for the term "transacting business" to be construed "to expand jurisdiction to the modern constitutional limit." *Mountaire Feeds, Inc. v. Argro Impex, S.A.*, 677 F.2d 651 (8th Cir. 1982); *SD Leasing, Inc. v. Al Spain and Associates, Inc.*, 277 Ark. 178, 640 S.W.2d 451 (1982). Using this liberal standard, we think the appellant in the instant case was "transacting business" in Arkansas within the meaning of our long-arm statute. Appellant was extensively involved with CMC as director, officer and general counsel, and CMC was directly responsible for the formation of Telecompo, the lessee corporation. Telecompo was formed in Arkansas and the appellant personally drafted its articles of incorporation and mailed them to Arkansas. CMC was also instrumental in the negotiation and execution of the lease agreement between appellee and Telecompo and the appellant's individual guaranty was clearly required by appellee because of his extensive involvement with CMC. These same facts also indicate that the court's exercise of personal jurisdiction was consistent with due process.

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the United States Supreme Court stated that due process requires only that certain "minimum contacts" exist between the nonresident and the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316. The Supreme Court further discussed the minimum contacts concept in *McGee v. International Life*

Inc. Co., 355 U.S. 220 (1957), where it held that for purposes of due process, a single contract could provide the basis for the exercise of jurisdiction over a nonresident defendant if the contract had substantial connection with [the forum] State." [sic]

We think that the lease agreement which appellant guaranteed clearly had substantial connection with Arkansas. In reaching this conclusion, we have considered the five factors outlined by the Eighth Circuit Court of Appeals in *Aftanese v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965) and recognized by this court in *Jagitsch, supra.* Tnese factors are to be considered in determining whether due process requirements have been satisfied and are listed in *Jagitsch* as follows:

> (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience to the parties.

Id. at 163.

Although appellant's contacts with Arkansas may have been few, we find that those contacts were substantial in nature and quality. Knowing that the appellee would require his individual guaranty, the appellant sent his financial statement to the appellee in Arkansas and then signed the guaranty agreement which was contained in the lease of personal property between two Arkansas corporations, and admits that he knew the lease would be sent to the appellee in Arkansas, that the property was in Arkansas, and that the payments would be made in Arkansas. In *Telerent Leasing Corp. v. Equity Associates*, 245 S.E.2d 229 (N.C.Ct. App. 1978), the court held that the fact that a nonresident appellant guaranteed a debt owed to a North Carolina resident was by itself sufficient

contact to withstand a due process challenge to the exercise of *in personam* jurisdiction over that appellant.

The remaining factors are also present in this case. The cause of action is directly related to the appellant's signing as guarantor of an Arkansas contract, and then failing to carry out his promise to guarantee; the Arkansas courts are obviously interested in providing a forum for Arkansas citizens to resolve disputes over contracts executed in Arkansas; and considering the fact that most of the parties were residents of this state, we think the convenience of the parties was best served by the hearing of the case in Arkansas.

The appellant points out that there is no evidence that he ever entered the State of Arkansas in connection with the lease or the guaranty, but in *SD Leasing, supra.*, the court found sufficient contacts to meet due process standards even though the defendant never physically entered the State of Arkansas. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court stated that "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *Id.* at 297. We think that when a party personally guarantees a lease between two Arkansas corporations, he should reasonably anticipate being haled into court in Arkansas if the lease goes into default. We find that due process requirements were met in this case, and the trial court was correct in finding that it had jurisdiction over appellant.

Appellant's second argument is that the trial court erred in finding that appellee's disposition of the computer equipment was commercially reasonable under the applicable provisions of the Commercial Code. See Ark. Stat. Ann. §85-9-504(3) (Supp. 1983). The lease agreement provided that upon repossession, appellee was entitled to recover from Telecompo all future rental pay-

ments less the rental or other value of the leased property. Appellant argues that the 22-month delay between the default and the disposition by sale, combined with the low sale price, made the sale commercially unreasonable. Therefore, it is argued, the court should have applied the presumption that the value of the collateral was equal to the debt, *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983), and should not have allowed appellee to recover the unpaid rental minus the resale price. In support, the appellant cities *McMillan v. Meuser Material & Equipment Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976), which held that a 14-month delay before a resale was commercially unreasonable under the Code.

Appellee tacitly agrees that this issue is governed by the Commercial Code and argues that it made timely, good faith efforts to resell but the equipment had become obsolete and no bids were received (except for one that was later withdrawn). The appellee distinguishes *McMillan*, because there the plaintiff did not attempt to resell for a year, whereas the plaintiff in the instant case began immediate efforts to resell the equipment.

There was evidence that six months of the 22-month period between default and disposition was occasioned by Telecompo's request for a delay in repossession so that it could try to work out some arrangement with CMC. During that period both Worthen and Telecompo tried to sell the computers. After repossession, appellee Worthen made extensive efforts to sell the equipment but could not find a buyer. Appellee's expert testified that the equipment could not be sold because (1) for this area the equipment was overpriced and cheaper computers could be found that would do the same job, (2) there was a lack of software available for new programs for these particular units, and (3) these units were cassette driven machines which were obsolete after the advent of floppy disc drives.

He said appellee was lucky to get anything for the equipment.

In *Thomas v. Int'l Harvester Credit Corp.*, 5 Ark. App. 244, 636 S.W.2d 296 (1982), we said under the evidence there the question of a commercially reasonable disposition was one of fact. We think that is true in this case also. We cannot say the trial judge's finding was clearly against the preponderance of the evidence and, therefore, we do not set it aside. ARCP 52(a).

Appellant's last point presents two arguments: (1) the lease was so subsequently altered as to excuse performance, and (2) the lease is void for lack of mutuality.

The first argument is based upon the fact that two 24K memory expansions were not delivered to the lessee Telecompo. Appellant says the plain intent of the lease was for appellee to lease this equipment and that the failure to do so constituted a material alteration of the lease that the appellant guaranteed. *Moore v. First National Bank of Hot Springs*, 3 Ark. App. 146, 623 S.W.2d 530 (1981), is cited as authority for holding that a material alteration in the obligation assumed, made without the assent of the guarantor, discharges him.

Appellee responds by arguing that there was no material alteration in the terms of the lease in this case. First, appellee says the failure to deliver the 24K memory equipment left the lessee with equipment that had only a 16K memory capacity, but that there was no specification anywhere in the lease that called for equipment with any certain memory capacity. Second, appellee says even if a term of the lease was altered as alleged by appellant, such an alteration could not be found material because there is no evidence that the difference between a 16K and 24K memory capacity would have any effect on the operations of the lessee had that corporation become operative. Ap-

pellee's computer expert so testified and also said this difference did not, in fact, affect the resale value of the equipment. Third, appellee says there was really no alteration of the lease but only a mutual mistake in failing to deliver the 24K memory equipment as invoiced to appellee's leasing agent FALCO. The evidence does show that neither FALCO nor the lessee knew the memory capacity of the equipment until after the lessee's operation had failed and there is no evidence that either party agreed to accept any equipment other than that invoiced. We agree that the trial court could hold there was no material alteration in the lease for any or all of the three reasons advanced by appellee.

We think the record will also support the court's rejection of appellant's contention that the lease was void for lack of mutuality. The lease did exempt appellee from liability if the supplier or manufacturer failed to fill appellee's order for the computer equipment to be leased. However, *Moore v. First National Bank, supra.*, rejected the argument that this type provision made a lease void for lack of mutuality. Although the lease also contained an indemnity agreement, the appellee was clearly obligated to perform under the lease and the court did not err in refusing to hold the lease void for lack of mutuality.

Affirmed.

Glaze and Corbin, JJ., dissent.

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS

WORTHEN BANK & TRUST CO., N.A.
Plaintiff
vs.

No. Civ 78-341

TELECOMPO OF ARKANSAS, INC., CHARLES D. THORNTON, COMPOSITION MANAGEMENT COMPANY, NORMA SUE EVANS, AND H. WAYNE MEACHUM
Defendants

JUDGMENT

On December 20, 1982, the complaint by plaintiff Worthen Bank & Trust Co., N.A., against defendant H. Wayne Meachum came on for trial before the Court, Honorable George F. Hartje, Circuit Judge, presiding, plaintiff Worthen Bank & Trust Co., N.A. appearing by and through Tom Geis and its attorney, Annabelle Clinton, defendant H. Wayne Meachum appearing personally and by and through his attorney, Peter B. Heister. From the testimony, exhibits, arguments of counsel and briefs, the Court makes the following findings:

1. The Court has jurisdiction over defendant H. Wayne Meachum ("Meachum") pursuant to the Arkansas Long-Arm Statute, Ark. Stat. Ann. §27-2502, et seq.

2. On November 10, 1077, Worthen Bank & Trust Co., N.A. ("Worthen") entered into a contract for the lease of two Texas Instrument Model 770 Computers, Serial Numbers 01770221 and 01770222 ("the computer equipment"), to a company known as Telecompo of Arkansas, Inc. ("Telecompo").

3. Worthen purchased the computer equipment from Composition Management Company ("CMC"), a Texas corporation, and then leased it to Telecompo.

4. Defendant Meachum, individually and as an officer of CMC, unconditionally guaranteed the full performance of the lease by Telecompo.

5. Meachum was a director, officer, stockholder and general counsel of CMC.

6. Although defendant Meachum did not physically enter the State of Arkansas, he did prepare the necessary papers for incorporation of Telecompo in the State of Arkansas, and forwarded those papers to Arkansas for filing.

7. Defendant Meachum furnished his personal financial statement to Worthen in connection with his guarantee of Telecompo's performance under the lease.

8. Telecompo defaulted in its performance of the lease in February, 1978.

9. Worthen disposed of the computer equipment in a commercially reasonable manner.

10. The deficiency remaining after sale of the computer equipment was $26,246.00.

11. Defendant Meachum's guaranty agreement is valid and enforceable.

12. Worthen is entitled to a judgment against defendant Meachum in the amount of $26,246.00, plus interest from December 12, 1979 at the rate of eight percent (8%) per annum and from the date of this judgment at the rate of ten percent (10%) per annum.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff, Worthen Bank & Trust Co., N.A.,

do have and recover of and from defendant H. Wayne Meachum, the sum of $26,246.00, with interest thereon from December 12, 1979 at the rate of eight percent (8%) per annum and from the date of this judgment at the rate of ten percent (10%) per annum; that plaintiff recover of and from defendant H. Wayne Meachum its costs expended in this proceeding; and that execution may issue hereon.

DATED this 6 day of Sept., 1983.

George F. Hartje
CIRCUIT JUDGE

APPROVED AS TO FORM:

WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
Little Rock, AR 72201

By /s/
Annabelle Clinton
Attorneys for Plaintiff

LASER, SHARP, HALEY,
YOUNG & HUCKABAY
One Spring St.—Suite 300
Little Rock, AR 72201

By /s/
Peter B. Heister
Attorneys for Defendant
H. Wayne Meachum

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS

WORTHEN BANK & TRUST COMPANY, N.A.
PLAINTIFF

vs.

No. Civ-78-341

TELECOMPO OF ARKANSAS, INC., CHARLES D. THORNTON, COMPOSITION MANAGEMENT COMPANY, NORMA SUE EVANS, AND H. WAYNE MEACHUM
DEFENDANTS

ANSWER OF H. WAYNE MEACHUM

Comes the Defendant H. Wayne Meachum without waiving his Motion to Dismiss filed herein and without submitting to the jurisdiction of the Court but expressly denying that the Court has jurisdiction over his person or the subject matter of this litigation and for his Answer to the Complaint filed herein states:

1. That this Defendant is a resident of State of Texas. He has never transacted any business in the State of Arkansas nor maintained any office in the State of Arkansas. He has had no contact with the State of Arkansas such as would give the State of Arkansas or this Court jurisdiction over his person or the subject matter of this litigation.

2. That he is without knowledge concerning the status of the Plaintiff or the status of the other Defend-

ants. He denies the remaining allegations of Paragraph 1 of the Complaint.

3. He admits that Telecompo of Arkansas, Inc. signed a document, a copy of which is attached to the Complaint as Exhibit "A." He is without knowledge concerning the amount or the timing of the payments.

4. He denies the remaining allegations of Paragraph 3.

5. He admits that he signed the document attached to the Complaint as Exhibit "A" but denies that said guaranty is enforceable. He denies the allegations of paragraphs 1, 2, 3 and 4 not admitted herein.

6. That Defendant Meachum received nothing of value in return for his execution of the guaranty. As a result of the lack of consideration, the guaranty is unenforceable.

7. Plaintiff supplied Defendant with the financial statements of the co-guarantors, Charles E. Thornton and Norma Sue Evans. These financial statements were incorrect and contained materially incorrect and false financial data concerning these co-guarantors. Plaintiff knew or should have known the financial statements were incorrect.

8. But for these false and incorrect representations, Defendant H. Wayne Meachum would not have executed the guaranty herein and that as a result the guaranty is void and unforceable as to him.

9. That the Agreement attached to the Complaint as Exhibit "A" and denominated a lease is in fact a Retail Installment Sales Contract under the terms of which the

Telecompo of Arkansas, Inc. was to receive title to the equipment described therein. Under the terms of the agreement the Plaintiff was to receive in excess of the legal interest rate. That the Agreement is usurious, void and unenforceable as to Telecompo of Arkansas, Inc. and to the guarantors.

10. The lease agreement and guaranty are unenforceable, illusory and void as they lack mutuality in that Plaintiff has inserted sufficient exculpatory language in its lease to give it license to refuse to perform. Moreover, the document purports to exempt the Plaintiff from liability under the lease and for this reason the agreement lacks mutuality.

11. The Defendant guarantor is released of liability as the lessor and lessee materially altered the terms of the lease without notice to the Defendant.

12. That the Plaintiff failed to mitigate or minimize his damages by reasonable efforts to sell or lease the equipment. In addition, Defendant had a legal interest in the collateral via his status as guarantor. Further, Defendant relied on the value of the collateral when executing the guaranty. Plaintiff had a duty to preserve the value of the collateral. Plaintiff's acts with regard to the collateral substantially impaired the value of the collateral, increased the guarantor's risk and therefore discharged Defendant Meachum.

13. That the sale of the collateral was not conducted in a commercially reasonable manner as required by the Uniform Commercial Code, i.e., the method, manner, time, place and terms of the sale were not commercially reasonable. This Defendant received no notice of the sale as required by law. In addition, the failure to provide notice impaired Defendant Meachum's ability to protect his rights in the collateral.

14. That the sum prayed for does not reflect an offset or other reduction for the value of the equipment.

WHEREFORE, Defendant H. Wayne Meachum prays:

(1) That the Court dismiss this matter for lack of jurisdiction;

(2) That the Complaint of the Plaintiff be in all things denied, for his costs herein incurred and all proper relief.

LASER, SHARP, HALEY,
YOUNG AND HUCKABAY
One Spring Street, Third Floor
Little Rock, Arkansas 72201

By /s/
Peter B. Heister

CERTIFICATE OF SERVICE

I, Peter B. Heister, do hereby certify that a copy of the foregoing Answer has been forwarded to Ms. Annabelle Clinton, 2200 Worthen Bank Building, Little Rock, Arkansas, 72201 and to Mr. William Brazil, 1008 Front Street, Conway, Arkansas, 72032, on this 1 day of October, 1982.

/s/
Peter B. Heister

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS

WORTHEN BANK & TRUST COMPANY, N.A.
PLAINTIFF

vs.

No. Civ 78-341

TELECOMPO OF ARKANSAS, INC., CHARLES D. THORNTON, COMPOSITION MANAGEMENT COMPANY, NORMA SUE EVANS, AND H. WAYNE MEACHUM
DEFENDANTS

MOTION TO SET ASIDE JUDGMENT BY DEFAULT

The Defendant H. Wayne Meachum, by and through his attorneys, Laser, Sharp, Haley, Young & Huckabay, without submitting to the jurisdiction of the court but objecting thereto, moves this Court to vacate and set aside the judgment entered against him by this Court in the above-styled action for just cause and in support thereof states as follows:

1. On February 5, 1980, a default judgment (the "Default Judgment") was entered by this Court in the above-styled Civil Action No. CIV 78-341 against the Defendant H. Wayne Meachum ("Mr. Meachum") holding him liable, jointly and severally with the other Defendants therein, to the Plaintiff in the amount of $26,246.00, with interest thereon from February 5, 1980, at the rate of ten percent (10%) per annum, and for their costs therein expended and for an attorneys' fee in the amount of $500.00. Said judgment also grants judgment to Tele-

compo of Arkansas, Inc. and Charles D. Thornton against Defendants Composition Management Company, Norma Sue Evans and Mr. Meachum jointly and severally in the sum of $10,750.00 with interest. Said judgment also grants judgment to Telecompo of Arkansas, Inc. and Charles D. Thornton against defendants Composition Management Company, Norma Sue Evans and Mr. Meachum jointly and severally in the amount of $26,246.00 plus interest and $500.00 attorney fees.

2. The Default Judgment was based upon alleged service of process on Mr. Meachum made by the attorneys for the Plaintiff purportedly pursuant to *Ark. Stat. Ann.* §27-2503. Default Judgment was rendered based on service by mail. An attorney ad litem was not appointed in accordance with ARCP 4(i). Such an appointment is a condition precedent to entering a default judgment.

3. Mr. Meachum is, and was at all times herein relevant, a citizen of the State of Texas, having his domicile and principal place of residence located in Dallas, Texas. The relevant document was executed in Texas. Mr. Meachum has done no business in Arkansas nor has he transacted any business in Arkansas or had any other contact with Arkansas which would give the court jurisdiction over Mr. Meachum. The trial court therefore has no jurisdiction over Mr. Meachum.

4. Mr. Meachum was not properly served in the above-styled Civil Action No. CIV 78-341 because someone other than and not an agent of Mr. Meachum may have or did sign a return receipt form indicating receipt of service of process in this action.

5. As a direct result of the lack of valid service of process on Mr. Meachum, this Court did not and does not

have jurisdiction over Mr. Meachum and the Default Judgment entered by this Court in Civil Action No. CIV 78-341 is null and void as to Mr. Meachum.

6. The purported service of process on Mr. Meachum described in Paragraph 3 hereinabove is not satisfactory or valid service or process upon Mr. Meachum, and the Default Judgment issued by this Court thereon constitutes a violation of the right of Mr. Meachum to due process of law pursuant to the Amendments of the United States Constitution.

7. The pleadings do not allege sufficient facts to support a default judgment against Mr. Meachum.

8. Co-defendants, Telecompo of Arkansas, Inc. and Charles D. Thornton, filed timely answers setting forth defenses common to Mr. Meachum. Such answer inures to the benefit of Mr. Meachum. Therefore, the Default Judgment should have been denied as a matter of law.

9. Mr. Meachum has a valid defense to the cause of action asserted against him in Civil Action No. CIV 78-341 in that: to-wit, Mr. Meachum alleges that the Defendants Norma Sue Evans, Charles Thornton and Telecompo of Arkansas, Inc., therein intentionally induced him to sign the lease agreement in issue as a co-guarantor through misrepresentation of the nature and amounts of items contained in the accounts listed in the financial statements thereof. Further, he denies making any agreement with Telecompo of Arkansas, Inc. and Charles D. Thornton in Arkansas or elsewhere. Further, he denies he unconditionally guaranteed any indebtedness to the plaintiff. Further, this Court is without jurisdiction.

10. The judgment entered herein should be vacated and set aside for the reasons described herein as more fully explained in the Brief in Support of Motion to Set Aside Judgment by Default which is attached hereto and hereby incorporated by reference.

WHEREFORE, H. Wayne Meachum prays the Judgment entered herein be vacated and set aside, for his costs, a reasonable fee for his attorney and all proper relief.

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Meachum

By /s/
Peter B. Heister